Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM,
CAROLYN HOLDER,
pro se, on behalf of themselves and class of similarly situated persons,

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

Preface

An employer implemented a voluntary early retirement incentive plan (hereafter "VEREP"). Before the eligibility periods expired the positions of some of the individuals eligible for VEREP were eliminated. Petitioners and prospective class members compose that class of individuals. This class was given no option to remain employed. All remaining individuals had the option of remaining in their positions or retiring under that plan. The employer also eliminated the positions of others, not eligible for VEREP, these individuals qualified for severance benefits. Petitioners and prospective class members who qualified for VEREP also qualified for these same severance benefits. Petitioners and the prospective class were denied or required to chose between VEREP and their severance benefits. All petitioners and prospective class members are in the age-protected class; all have pension eligibility status.

This petition presents five questions to the Supreme Court, which collectively, constitutes an issue of first impression.

Question 1

Does ADEA, as amended by OWBPA, provide the controlling statutes for ERISA and all other employee benefit plans where benefits are applicable to age-protected individuals?

Question 2

Does implementing a voluntary early retirement incentive plan which does not provide age protected individuals an option of remaining employed, compel their retirement or otherwise violate 29 U.S.C. §621 *et seq.* If so, what is the remedy?

Question 3

Where individuals in the age-protected class have qualified for severance benefits on the same terms and conditions as other workers, does the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, prohibit the reduction or denial of severance to

those individuals except as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) or (ii) or §623 (*l*)(2)(A)? If so, were the conditions set forth in any of these statutes satisfied by the defendants when implementing their VEREP and Severance plan(s)?

Question 4

Should the Court so find in Question 3 *supra*, the answers "yes" and "no" respectively, does an ERISA plan administrator or an employer violate 29 U.S.C. §621 *et seq*., by action contrary to these controlling statutes where the ERISA severance benefit is applicable to age protected individuals? If so, does a Federal Court, in such circumstance, have discretion to deny the certification of an ERISA class when all other conditions for certification are met?

Question 5

Does the standard for liquidated damages, established as *stare decisis* by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, (1985) apply in this case as a matter of law?

LIST OF PARTIES

Petitioners before this Court and appellants in the proceedings below are:

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM and CAROLYN HOLDER,
pro se on behalf of themselves and class of similarly situated persons.

v.

Respondents before this Court and appellees in the proceedings below are:

JOHNSON & JOHNSON, a New Jersey Corporation.

THE SEVERANCE PLAN OF JOHNSON & JOHNSON AND AFFILLIATED COMPANIES,

its Plan Administrator,

THE JOHNSON & JOHNSON PENSION COMMITTEE.

MCNEIL-PPC, INC., also known as the Personal Products Company ("PPC"), a New Jersey Corporation.

JOHNSON & JOHNSON WORLDWIDE ABSORBENT PRODUCTS MATERIALS & RESEARCH, an unincorporated division of Johnson & Johnson.

as class action defendants, those identified above AND the affiliates of the Johnson & Johnson & Affiliated Companies identified below:

"A" COMPANY, a Delaware Corporation, a domestic subsidiary doing business in California.

ABSORBENT PRODUCTS & MATERIALS RESEARCH, a New Jersey Corporation.

ADVANCE CARE PRODUCTS, INC., a New Jersey Corporation.

CELLULOSE PRODUCTS CORP., a New Jersey Corporation.

CODMAN & SHURTLEFF, INC., a domestic subsidiary doing business in various locations including Massachusetts and Kentucky.

CRITIKON, INC., a Florida Corporation.

ETHICON ENDO-SURGERY, an unincorporated entity doing business in Ohio.

ETHICON, INC., an Ohio Corporation.

IMMUNOBIOLOGY RESEARCH INSTITUTE, INC., a New Jersey Corporation.

IOLAB CORPORATION, a California Corporation.

JASSEN PHARMACEUTICA INC., a New Jersey Corporation.

JASSEN RESEARCH FOUNDATION, an unincorporated entity doing business in Michigan and Pennsylvania.

JOHNSON & JOHNSON ADVANCED MATERIALS COMPANY, a New Jersey Corporation.

JOHNSON AND JOHNSON CONSUMER PRODUCTS, INC., a New Jersey Corporation.

JOHNSON & JOHNSON DEVELOPMENT CORPORATION, a New Jersey Corporation.

JOHNSON & JOHNSON FINANCE CORPORATION, a New Jersey Corporation.

JOHNSON & JOHNSON HEATH CARE MANAGEMENT, INC., a New Jersey Corporation.

JOHNSON & JOHNSON HOSPITAL SERVICES, INC. a New Jersey Corporation.

JOHNSON & JOHNSON INTERNATIONAL, a New Jersey Corporation. (emphasis added)

JOHNSON & JOHNSON INTERVENTIONAL SYSTEMS COMPANY, a New Jersey Corporation. (emphasis added)

JOHNSON & JOHNSON MEDICAL, INC., a New Jersey Corporation.

JOHNSON & JOHNSON MERCK CONSUMER PHARMACEUTICALS CO., a New Jersey Corporation.

JOHNSON & JOHNSON ORTHOPEDICS, INC., a New Jersey Corporation.

JOHNSON & JOHNSON SERVICES INC., a New Jersey Corporation.

JOHNSON & JOHNSON VISION PRODUCTS, INC., also known as VISTAKON, a Florida Corporation.

LIFESCAN, INC., a California Corporation.

MCNEIL COMSUMER PRODUCTS, a New Jersey Corporation.

MCNEIL SPECIALTY PRODUCTS COMPANY, a New Jersey Corporation.

NORAMCO, INC., a Georgia Corporation.

ORTHO BIOTECH, INC., a New Jersey Corporation.

ORTHO DIAGNOSTIC SYSTEMS INC., a New Jersey Corporation.

ORTHO PHARMACEUTICAL CORP., a Delaware Corporation.

R.W. JOHNSON PHARMACEUTIAL RESEARCH INSTITUTE, an unincorporated entity doing business in New Jersey.

SITE MICROSURGIAL SYSTEMS, INC. a Pennsylvania Corporation.

THERAKOS, INC., a Florida Corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED ---------- i-ii

LIST OF PARTIES ---------- iii-vi

TABLE OF CONTENTS ---------- vii-viii

TABLE OF AUTHORITIES ---------- ix-x

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGEMENTS BELOW ---------- 1

STATEMENT OF JURISDICTION ---------- 1

THE COURT'S ORDERS
PERTAINING TO PETITION FOR WRIT OF CERTIORARI -- 1-2

STATUTES INVOLVED ---------- 2

RATIONALE FOR THE QUESTIONS PRESENTED ---------- 2-5

STATEMENT OF THE CASE: -PART I- FACTS MATERIAL
TO CONSIDERATION OF QUESTIONS PRESENTED ------- 5-11

STATEMENT OF THE CASE: -PART II- ARGUMENTS
IN SUPPORT OF EACH QUESTION PRESENTED --------- 11-27

Question 1 ---------- 11

Question 2 ---------- 12-17

Question 3 ---------- 17-23

Question 4 ---------- 23-25

Question 5 ---------- 26-29

SUMMARY FOR THE RATIONALE TO REVIEW
THE CASE AND FINAL ARGUMENTS ---------- 29-36

CONCLUSION ---------- 36

SIGNATURE PAGE ---------- 37

INDEX FOR THREE-VOLUME APPENDIX ---------- App. i-iii

App.1-43 ---------- Volume I
App.44-95 ---------- Volume II
App.95-144 ---------- Volume III

TABLE OF AUTHORITIES

CASES — PAGE NO.

A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) ---------- 21

Bodnar v. Synpol, Inc., 843 F.2d 190, 192-93 (5th Cir.)
cert. denied, 488 U.S.- 908 (1988) ---------- 14

DeWitt v. Penn-Del Directory Corp.,
106 F.3d 514 (3d Cir. 1997) ---------- 31

DiBiase v. Smithkline Beecham Corp.,
48 F.3d 719 (3d Cir. 1995) ---------- 30

Equal Employment Opportunity Commission
v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984) ---------- 18,19

Equal Employment Opportunity Commission
v. Westinghouse Electric Corp. ("Westinghouse I"),
725 F.2d 211(3d Cir. 1983), cert. denied 469 U.S. 820 ------- 18,19
(1984)

Equal Employment Opportunity Commission
v. Westinghouse Electric Corp.("Westinghouse II"), ----------18
869 F.2d 696 3d Cir. 1989); vacated and remanded
for reconsideration under "Betts"

Hamilton v. Air Jamaica, Ltd.,945 F.2d 74 (3d Cir. 1991) --- 30, 31

Hazen Paper Co. v. Biggins,507 U.S. 604 (1993) ----------34-36

Henn v. National Geographic Soc'y, 819 F.2d 824, 829
(7th Cir.) cert. denied, 484 U.S. 964 (1987) ---------- 14, 10

Kalvinskas v. California Institute of Tech.,
96 F.3d 1305 (9th Cir. 1996) ---------- 13, 32

Long v. Sears Roebuck & Co., 105 F.3d 1529
(3d Cir. 1997), cert. denied 118 S.Ct. 1033 (1998) ---------- 22

TABLE OF AUTHORITIES

CASES	PAGE NO.
May v. Shuttle, Inc., 129 F.3d 165 (DC Cir. 1997)	16
Ohio Public Employees Retirement Sys. v. Betts, 492 U.S. 158 ("Betts"),	3, 23, 31
Oubre v. Entergy Operations, Inc., 118 S. Ct. 838 (1998)	22, 29
Paolillo v. Dresser Industries, Inc. 821 F./ 2d 81, 84 (2d Cir. 1987)	11
Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121 (6th Cir. 1998)	8
Sexton v. Beatrice Foods, 630 F.2d 478 (7th Cir. 1980)	21
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)	26, 29
Older Workers Benefit Protection Act (OWBPA) Pub. L No. 101-433, 101st Cong., 2d Sess., 104 stat.978	*passim*
HR. Rep. No. 101-664 (1990)	*passim*
S. Rep. No. 101-263 (1990)	*passim*
Sen. Comm. on Labor and Human Resources, 102d Cong. *Legislative History of the Older Workers Benefit Act (1991)*	*passim*
136 Cong. Rec. H8617 (daily ed. Oct. 2, 1990)	21

PETITION FOR WRIT OF CERTIORARI

Hawes *et al.* v. Johnson & Johnson *et al.*,
No 98-6408, (3rd Cir. Oct.20, 1999)

Petitioners respectfully pray that a writ of *certiorari* issue to review all the judgements of the United States Court of Appeals for the Third Circuit entered on October 20, 1999 and the denial of petitions for rehearing *en banc* on December 30, 1999.

OPINIONS AND JUDGEMENTS BELOW

The opinion and orders of the United States Court of Appeals for the Third Circuit filed on October 20, 1999, and petitions for rehearing and rehearing *en banc* denied on December 30, 1999 are unreported and reprinted herein at App.1-20.The opinions and orders of the District Court of New Jersey are unreported and are reprinted herein at App.24-43. (Hawes, *et al*, 24-31), (Class Certification, App.32-38), (Holder, App. 39-43).

STATEMENT OF JURISDICTION

Based upon their allegations regarding severance benefits, petitioners asserted original federal jurisdiction pursuant to 28 U.S.C. §1331(a) (federal question), 28 U.S.C. §§2201 and 2202 (declaratory relief), 29 U.S.C. §626(c) (ADEA violations) and 29 U.S.C. §1132(e) (ERISA plan benefits), and pendant jurisdiction as to their state law claims. (JA53-54 1-2, JA116 1-2, Joint Appendix on appeal hereafter ("JA")). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). App.130.

THE COURT'S ORDERS PERTAINING TO PETITION FOR WRIT OF CERTIORARI

On March 1, 2000, the Court granted petitioners' Application for an extension of time to May 1, 2000 to file petition for a writ of *certiorari*. On April 12, 2000, the Court granted petitioners' Second Application for an extension of time to May 16, 2000 to file petition for a writ of *certiorari*. On April 12, 2000, Associate Justice, the Honorable David Hackett Souter granted petitioners' Application to

file petition for a writ of *certiorari* in excess of the page limitations provided that the petition does not exceed 36 pages.

STATUTES INVOLVED

Set out Verbatim in Appendix at Volume III

	App. Page
28USC §1254 (1)	130
29USC §621 (a)	130-131
29USC §623 (a) (1), (2), (3)	131-132
29USC §623 (f) (2) (A)	132
29USC §623 (f)(2)(B) (i), (ii)	132-133
29USC §623 (f) (3)	133
29USC §623 (i) (8), (9)	133
29USC §623 (k)	134
29USC §623 (*l*) (i), (ii), (iii)	134
29USC §626 (c) (1) (2)	135-136
29USC §630 (a), (b), (f), (*l*)	135-136
29USC §631 (a)	136
29USC §1001	137
29USC §1002 (1), (3)	137

Code of Federal Regulations1625.10 (a),(b),(c),(d),(f) --- 138-142

RATIONALE FOR THE QUESTIONS PRESENTED

Petitioners submit to this Court that it is the ADEA, as amended by OWBPA, which provides the controlling statutes for ERISA and all other employee benefit plans where the benefits are applicable to an age-protected individual. Neither an employer, nor an ERISA plan administrator, nor even a Court of Law may act in a manner contrary to the mandates of these controlling statutes.

Section 4(a) of the Age Discrimination in Employment Act (ADEA) codified at 29 U.S.C. §623(a)(1) makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." App.131. See also N.J.S.A. §10:5-12(a).

When Congress enacted Title I of the Older Workers Benefit Protection Act ("OWBPA"), in October 1990 it specifically repudiated this Court's decision in Ohio Public Employees Retirement System v. Betts ("Betts"), 492 U.S. 158 (1989). See S. Rep. No. 263, 101st Cong. 2d Sess., reprinted in 1990 U.S. Code Cong. & Admin News at 1517.

Notwithstanding this Court's interpretation of ADEA in Betts, Congress explained that the Older Worker's Benefit Protection Act was intended:

> to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29U.S.C. 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations. (emphasis supplied)

Pub.L. No. 101-433 at §101, 104 Stat. at 978. See App.131

Congress therefore added a provision to ADEA now codified at **29 U.S.C. §630(*l*)** making it clear that "all employee benefits provided pursuant to a bona fide employee benefit plan" were encompassed within the term "compensation, terms, conditions, or privileges of employment" and therefore subject to ADEA's prohibitions upon age discrimination. Congress also removed from **29 U.S.C. §623(f)(2)** the "subterfuge" language relied upon by this Court in Betts to require subjective proof of discriminatory motive with regard to differences in benefits provided to older and younger workers [1], and replaced it with an objective test, only permitting a

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[1] In Betts, this Court relied upon the subterfuge language then codified at 29 U.S.C. §623(f)(2), to hold that all bona fide benefit plans that are not "a method of discriminating in other nonfringe-benefit aspects of the employment relationship" were exempt from ADEA, and that an employee challenging a benefit plan under ADEA "bears the burden of proving that the-discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relationship". 492 U.S. at 181.

plan administrator to implement an offset between severance and pension benefits under the specific circumstances set forth in 29 U.S.C. §623(*l*)(2)(A), or 29 U.S.C. §623(f)(2)(B)(i)

> where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

See 29 U.S.C. §623(f)(2)(B)(i) at App.132. See CFR 1625.10 at App.138-142.

The federal regulations thus incorporated into ADEA at 29 U.S.C. §623(f)(2)(B)(i) specify that where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of Section 4(a), see 29 C.F.R. §1625.10(a)(2) at App.139. It is, however, an act of age discrimination, regardless of prohibited motive, to interpret and/or apply any benefit plan provision to provide older workers lower benefits than younger workers unless the reduction can be justified by a higher cost incurred to provide that particular benefit to older workers. See 29 C.F.R. §1625.10(a)(1), (a)(2), (b), (c), (d) and (f) at App.138-142.

A grant of *certiorari* in this case will afford the Supreme Court of the United States an important opportunity to examine an issue of first impression in interpreting the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*, as amended by the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No.101-433, 101st Cong., 104 Stat. 978 and its intertwining effects on all employee benefit plans including those qualified under the Employee Retirement Income Security Act (ERISA) 29 U.S.C. §1001 *et seq*. At issue are the statutory provisions of OWBPA that prohibit an employer from requiring or permitting the involuntary retirement of an individual because of age and the provisions that permit an employer to deny or to offset severance

benefits with pension benefits for which an age-protected employee is independently qualified.

STATEMENT OF THE CASE: -PART I- FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

Petitioners and prospective class members are former employees of Johnson & Johnson or its Affiliated or Subsidiary Companies (hereafter "J&J Companies") who were qualified for severance benefits pursuant to the terms of a severance plan sponsored by Johnson & Johnson and qualified under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*, (hereafter "ERISA"). See the Severance Plan of Johnson and Johnson and Affiliated Companies at App.44-58, (hereafter J&J severance plan). See Article 8.2, Controlling Law at App.57. The J&J severance plan was executed by the Pension Committee of Johnson & Johnson, the plan administrator, on September 8, 1992, see App.58. Petitioners and prospective class members were also qualified for the Johnson & Johnson Voluntary Early Retirement Enhancement Program, (hereafter "VEREP"), a qualified voluntary early retirement incentive plan under ERISA, 29 U.S.C. §1002 *et seq*. See (JA479).

VEREP was amended into the Retirement Plan of Johnson & Johnson and Affiliated Companies on December 15, 1994 and made retroactive to January 1, 1989. See CERTIFICATION OF PENSION PLAN AMENDMENT AND RESTATEMENT at App.95, (JA409). See ARTICLE 12, EARLY RETIREMENT INCENTIVES at App.63-65. See EXHIBIT E, EARLY RETIREMENT INCENTIVE PROGRAMS at App.66-73. See TABLE OF CONTENTS of the Retirement Plan of Johnson & Johnson and Affiliated Companies at App.59-62. See entire plan at (JA409-509).

VEREP requires the attainment of the minimum age of 50 as a condition of eligibility. Therefore by necessity all employees who qualified for VEREP are age-protected individuals, See 29 U.S.C. §631 (a) where; *"The prohibitions in this chapter shall be limited to*

individuals who are at least 40 years of age." App.136. See Key to Eligibility Requirements, App.72 at (a).

The purpose of VEREP was to encourage Johnson & Johnson's workers who qualified to retire voluntarily. VEREP included the following three retirement incentives:

1) Increasing an individual employee's pension benefit by the addition of (5) years to an individual's age and the addition of (3) years to an individual's credited service. See VEREP plan at App.66-67, see Second Affidavit of Robert Muscarella at App.88 at ¶ 3, see exhibits attached thereto at App.92-93, 94.

2) A "Service Benefit" paid from the pension plan and equal to two weeks of regular base pay multiplied by the total number of actual years of service up to a maximum of 52 weeks. The "Service Benefit" was paid from J&J's qualified pension plan, subject to spousal consent, subject to an additional early distribution tax of 10%, not taxed for social security and qualified for a "roll over" into an Individual Retirement Account (IRA). The VEREP provided an option in that the "Service Benefit" could be elected as a lifetime annuity. If this option is elected the "Service Benefit" is added to and paid out in the individual's regular monthly pension benefit. See VEREP subsection (b), App.67-68, (JA503b-504b), Affidavit at App.88 ¶¶ 4-6 (JA382-383), App.92 (JA387-388), App.94 (JA408). See also (JA403-404) at Q&A 48, (JA397-398) at Q&A 24 & 26. The Court may note the characteristics of the "Service Benefit" are that of a pension benefit. This fact is critical to a meaningful analysis of this case.

3) The right to elect retiree medical benefits and receive retiree life insurance, if an individual had not already acquired that right. An individual age 55 or older had previously qualified for this right, See App.92, (JA387).

VEREP, which must be and is written to comply with ADEA, see 29 U.S.C. 623(f)(2)(B)(ii) at App.132, was offered extensively

throughout no less than **30** J&J Companies. These same J&J Companies also participated in J&J's Severance Plan, see and compare App.70-71 (JA507), with App.79-80 (JA205-206), see also EXHIBIT A at App.64-65 (JA488-489). See transcript of 3rd Cir. oral argument hereafter "TS" at 123-124 ln.32-4.

Employees of J&J Companies were qualified for VEREP if they had obtained the minimum age of 50, had a minimum of (7) years of service, App.72 (a) (JA508), and met certain other qualifications as defined in the plan, (hereafter "VEREP individual(s)". See "Key to Eligibility Requirements" at App.72-73 (a)-(s) (JA508-509).

VEREP individuals were provided 45-day eligibility-election periods. These periods varied among the J&J Companies, however each age-protected individual had his or her own 45-day period. See App.70-71 (JA507).

In no way were the qualifications or eligibility requirements for VEREP conditioned upon position elimination or termination of employment. See "Key to Eligibility Requirements" at App.72-73 (a)-(s) (JA508-509). The Court may note, this fact is critical to a meaningful analysis of this case.

The general population of J&J employees who qualified as VEREP individuals had the option of electing the plan, receiving the package of enhanced benefits it provided by retiring or to remain employed. The Court may note, this fact is critical to a meaningful analysis of this case.

The positions of petitioners and prospective ERISA class members were eliminated before their 45-day eligibility period expired. Petitioners and prospective ERISA class members did not have the same options as other VEREP individuals because none had the option of remaining employed, (hereafter "VEREP *eliminated* individuals"). As discussed *infra* at pg.8. The Court may note, this fact is critical to a meaningful analysis of this case.

During the VEREP eligibility periods the same J&J Companies eliminated the positions of others, not qualified for the VEREP, in both the age-protected and non-age-protected classes. These other

employees were eligible and qualified for severance benefits equal to or greater than the minimums provided by J&J Severance Plan (hereafter "*others*"), all petitioners qualified for greater severance benefits. COMPARE: the number of weeks provided by: Milltown Plant Closure at App.85 (JA171) with J&J Severance Plan at App.50-51 subsections (a), (b) Minimum Benefit i-iii, and (c) Maximum Benefit. See defendants' reply brief on appeal at pg.14 reprinted at App.143, hereafter "DB".

In response to Magistrate Judge Ronald Hedges' order in this case on March 20, 1995, defendants identified no less than **30** J&J Companies that participated in the Severance Plan and VEREP, see *supra* at pg.7, See Magistrate Judge Ronald Hedges' order at App.77, ¶20. See defendants' response at App.78-80. Defendants also identified not less than **42** VEREP *eliminated* individuals, excluding petitioners who had qualified for severance and VEREP. See App.80-82 (JA207-208), 82-84 (JA209-210). COMPARE: the individuals listed and respective companies at App.78-84 with participating VEREP Companies listed at App.70-71.

It is undisputed that all four petitioners were informed that their terminations would take effect on October 29, 1993, DB at pg.7, The Personal Products Company (hereafter, "PPC"), a J&J subsidiary company, closed the engineering department where they were employed. PPC announced J&J's VEREP was available to its employees who met the eligibility requirements on September 1, 1993. The VEREP expiration date for all PPC's eligible employees was October 30, 1993, in all practical terms the same effective date as petitioners' scheduled terminations. Find Personal Products Company listed on App.70, COMPARE with App.85. (JA507 with JA171).

It is undisputed that as a result of their position eliminations, petitioners were qualified for a severance package on the same terms and conditions given to *others* who were affected by the PPC plant closure, see App.85 (JA171). See DB pg.14 at App.143. It can not be disputed that petitioners were required to choose between that severance package and the VEREP and that no other choice was provided to petitioners. See and COMPARE: SEVERANCE GUIDELINES PPC ENGINEERING (MILLTOWN PLANT

CLOSURE) at App.85 (JA171) with Memo to Robert Muscarella from R. J. Rapiejko, indicating choice between separation package and VEREP at App.86 (JA189). See Affidavit of Robert Muscarella at App.110 ¶¶ 6-9, ¶¶13-15. See DB pg.14 at App.143.

Petitioners had a Hobson's choice. No matter what choice they made they could not have saved their jobs and remained employed.

If they chose severance, they would give up their individual right to a one-time opportunity to receive substantial retirement benefits, the right to become eligible for retiree medical and retiree life insurance. If they chose VEREP they would give up their individual right to the severance package provided to *others*. Petitioners were compelled to choose VEREP. See JA189 reformatted at App.86

Petitioners were required to give up their right to their severance package because they qualified for and received VEREP.

Prospective ERISA class members, as well petitioners, also qualified for severance under J&J's severance plan. They were not informed of their severance, were required to choose VEREP or severance, or were denied this severance because they qualified for and received VEREP. See **42** VEREP *eliminated* individuals identified by defendants at App.80-82 (JA207-208), 82-84 (JA209-210), see also App.86 (JA189). See also affidavit of Carol Sapakie (JA198-200 ¶¶ 6-7, and EXHIBIT F attached thereto at JA213-216, listing **(60)** additional prospective class members.)

Petitioners filed three separate lawsuits between November 2, 1994 and August 16, 1995. The lawsuits were consolidated for all purposes by two separate orders, on March 20, 1995 and on January 31, 1996. (JA1-3) and (JA286-287).

In Count One of their complaint, petitioners asserted a claim for severance benefits under a qualified ERISA plan, 29 U.S.C. 1001 *et seq*. This claim is before this Court. (JA72-79, Hawes, *et al*.) (JA133-137, Holder). See also J&J severance plan, Article 8.2, Controlling-Law at App.57.

In Count Two of their complaint, only the ERISA Class claims for severance under a qualified plan remain before this Court. (JA79-82, Hawes, *et al.*) (JA138-140, Holder).

In Count Three of their complaint, petitioners raised their individual claims of age discrimination in denying their severance package, all in violation of prohibitions on age discrimination set forth in the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621 *et seq*. and the New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et seq*. See Milltown Plant Closure Severance pay at App.85 (JA171) and App.86 (JA189). See DB pg.14 App.143. These claims are before this Court. (JA83-85, Hawes, *et al*), (JA141-143, Holder)

On Order and Opinion filed on December 22,1995, the District Court granted the defendants partial summary judgement on those counts dealing with severance and denied petitioners Muscarella/Kadam/Hawes' cross motion for partial summary judgement on the same claims. See App.24-31, (PB1-1 to PB1-9, Plaintiffs' Brief on appeal, hereafter "PB").

On Order and Opinion filed on February 28, 1996, the District Court denied petitioners' certifications of ADEA and ERISA Classes, count three. See App.32-38, (PB2-1 to PB2-8).

On Order and Opinion filed on May 9, 1996, the District Court granted the defendants partial summary judgement on the same counts dealing with severance and denied petitioner Holders' cross motion for partial summary judgement on the same counts. See App.39-43, (PB3-1 to PB3-5).

Muscarella and Kadam proceeded to trial on their remaining termination claims. On September 23, 1998 a jury returned a verdict for defendants. Two days later a judgement of no cause was entered on Muscarella's and Kadam's remaining claims. See (JA642-643) (JA644).

At that point the litigation was completed as to all petitioners in the consolidated action, and final judgements had disposed of all claims with respect to all parties.

All four petitioners filed their notice of consolidated appeal on October 21, 1998, pursuant to 28 U.S.C. 1291. That appeal was limited to the orders dismissing their ERISA and ADEA severance claims and the denial of the motion to certify an ERISA class, Counts One, Two and Three. See (JA645-647)

On Judgement and Opinion filed on October 20, 1999, the Third Circuit Court of Appeals affirmed the judgements entered by the District Court and on December 30, 1999 denied petitions for rehearing and rehearing *en banc*. See App.1-20.

The instant case follows.

STATEMENT OF THE CASE: -PART II- ARGUMENTS FOR QUESTION PRESENTED

Petitioners address their arguments for each Question serially.

Question 1

Does ADEA, as amended by OWBPA, provide the controlling statutes for ERISA and all other employee benefit plans where benefits are applicable to age-protected individuals?

The "precise and detailed statutory strictures" [2] of OWBPA make clear that the act encompasses all employee benefits, including benefits provided pursuant to a bona fide employee benefit plan, see **29 U.S.C. §630(*l*).** All procedures governing employee benefits and benefit plans, ERISA or otherwise, are to comply with the Act, (OWBPA) regardless of the date of adoption, see **29 U.S.C. §623(k).** See also: **29 U.S.C. §623(f)(2)(B), 29 U.S.C. §623(f)(2)(B)(ii), and U.S.C. §623(*l*)(2)(A),** App. at 131-134. See pg. 2-4, *supra*.

The lower Courts in this case did not examine and completely ignored these statutory mandates.

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[2] Cf. Oubre v. Entergy Operations, Inc., 118 S. Ct. 838, 841 (1998) ("the Court is required to take Congress at its word with regard to the precise and detailed statutory strictures on a waiver of ADEA claims established by Title 2 of the ("OWBPA");

Question 2

Does implementing a voluntary early retirement incentive plan which does not provide age protected individuals an option of remaining employed, compel their retirement or otherwise violate 29 U.S.C. §621 *et seq*. If so, what is the remedy?

Petitioners submit by eliminating the positions of some VEREP individuals, defendants left VEREP *eliminated* individuals with no choice but to retire, see *supra* at pg.7-8. This action in and by itself, is age-adverse for two reasons.

First, the VEREP *eliminated* individuals did not have the option of remaining employed, as did the other VEREP individuals, in violation of U.S.C. 623 (a)(1), (2). This is *prima facie* proof of disparate treatment.

Second, it is a clear and undeniable statutory violation of 29 U.S.C. 623(f)(2)(B)(i), (ii), which states: *"...and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual"* (emphasis added). Defendants' violation of this express statute is proof of illegal adverse treatment.

COMPARE: the statutory language of 29 U.S.C. 623 (f)(2)(B) (ii), *supra,* with Sen. Comm. on Labor and Human Resources, 102d Cong., *Legislative History of the Older worker Benefit Protection Act* (Leg. Hist.), see Early retirement incentive plans at pg.27-28, which states:

> Since the 1978 amendments to the ADEA, there has been a dramatic rise in the number of early retirement incentive programs used by employers. These programs are designed to encourage individuals voluntarily to depart employment through the provision of additional financial incentives. .....EEOC testified that these two criteria should be included in the legislation. .....(1989).

> First, the amendments prohibit an early retirement incentive plan from requiring or permitting the involuntary retirement of any individual protected by the ADEA. Because early retirement incentive plans, by definition, target older workers, the circumstances surrounding their implementation must be carefully analyzed to ensure that they provide older workers with an uncoerced and free choice. .....The critical question involving allegations of involuntary retirement is whether, under the circumstances, a reasonable person would have concluded that there was but no choice but to accept the offer. *See Paolillo v. Dresser Industries*, Inc. 821 F./ 2d 81, 84 (2d Cir. 1987). ..... with the burden of proof under section 4(f)(2)(B), the employer bears the burden to demonstrate that the employee's participation in the plan is voluntary. (emphasis added).

See Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121 (6th Cir.1998) (early retirement upon elimination of position is constructive termination).

The 9th Circuit Court of Appeals recently found that an individual was required to retire within the meaning of 29 U.S.C. 623(f)(2) when his long-term disability was offset by pension benefits he could receive only by retiring. See Kalvinskas v. California Institute of Tech., 96 F.3d 1305 (9th Cir. 1996). The Court:

> ..... Caltech violated S 4(f)(2) of the ADEA, 29 U.S.C. S 623(f)(2), by offsetting Kalvinskas' disability benefits with pension benefits that he could receive only by retiring. Id. at 1307.
>
> ...we hold that a reasonable person in Kalvinskas' position would feel he had no choice but to retire." [5]
> Thus, Caltech's LTD plan, as applied to Kalvinskas, ' require[d]' his involuntary retirement within the meaning of S 4(f)(2).(emphasis added) Ibid.

The Kalvinskas Court at fn.5 further stated:

"The test for determining whether an employee benefit plan "require[s] or permit[s] the involuntary retirement of an individual," in violation of S 4(f)(2) is whether a reasonable person in the employee's position would feel compelled to resign under the circumstances. See Bodnar v. Synpol, Inc., 843 F.2d 190, 192-93 (5th Cir.) (test for constructive discharge under ADEA is "whether a reasonable person in the employee's position would have felt compelled to resign under the circumstances"; a ***prima facie*** case of age discrimination is established when "[a]n employer's 'offer' of early retirement ... sufficiently alters the status quo"), cert. denied, 488 U.S. 908 (1988); Henn v. National Geographic Soc'y, 819 F.2d 824, 829 (7th Cir.) (involuntary retirement under ADEA S 4(f) (2) may be shown if employer "manipulated the options so that [the employees] were driven to early retirement not by its attractions but by the terror of the alternatives"), cert. denied, 484 U.S. 964 (1987); S. Rep. No. 263, 101st Cong., 2d Sess. 5 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1532 ("The critical question involving allegations of involuntary retirement is whether, under the circumstances, a reasonable person would have concluded that there was no choice but to accept the offer [to retire].") (emphasis added). Id. at 1308, fn.5.

In the examination of the instant case, the District Court found that petitioners were told they were eligible for severance but found it unnecessary to determine whether petitioners were terminated (or retired) voluntarily or involuntarily. Hawes et al. v. Johnson & Johnson et al., No 94-5332, slip op. (DNJ Dec. 18,1995) App.24-31, (PB 1-9) the Court: "Defendants assert that plaintiffs were not terminated, but were given the option to retire by taking VEREP; therefore §4.1(b)(ii) is not applicable to plaintiffs". Slip op. at 2 App.26, op. at 4 App.28.

The court summarily stated: "Assuming arguendo that plaintiffs were involuntarily terminated," slip op. at 4, App.28.(PB1-5) and concluded; "...plaintiffs were treated better than younger employees because VEREP entitled them to immediate receipt of their pension benefits and additional medical benefits." (emphasis added). Slip op, at 9, App.30.

The Court examined the J&J severance plan, but did not examine the terms and qualifications of the VEREP and did not consider OWBPA provisions anywhere in its opinion. Both parties had discussed these statues extensively in their summary judgement pleadings; and the record before the Court included both plan documents in their entirety (JA409-509, J&J retirement plan) (JA109-113k, J&J severance plan). See cross motions for partial summary judgement, plaintiffs' initial brief at pg.26-31, defendants' initial brief at 19-20, transcript of oral argument for PSJ at 15 (JA526 ln.10-11). Nonetheless the Court ignored these record references and statutory citations.

The same Court in the companion case of Holder v. Johnson & Johnson, No. 95-4351 (D.N.J. May 9, 1996) stated:

> The Court's previous decision to grant summary judgement was based on the fact that the persons who choose VEREP rather than severance were economically advantaged. Furthermore, the court held that there was no evidence of age discrimination because the older employees, plaintiffs, were treated better than the younger employees, i.e. received more money. (emphasis added), slip op. at 4, App.43, (PB3-5)

The consolidated cases went before the 3rd Circuit Court of Appeals, Hawes et al. v. Johnson & Johnson et al., No 98-6408, (3rd Cir. Oct.20,1999), App.1-20.

At oral argument defendants' counsel, cited provisions in the J&J severance plan and asserted that the two triggering events: 1) involuntary termination, qualifying for severance, and 2) voluntary termination, qualifying for VEREP, were mutually exclusive and therefore petitioners terminations was voluntary because they choose VEREP. See transcript of oral argument, hereafter "TS" at App.126 line 6-18. See DB at pg.18, pg.39-40 reprinted at App.143-144. See also DB at pg.12-14, pg.21-23. Counsel asserted petitioners voluntarily retired notwithstanding the absence of any option to remain employed. Defendants cited no statute but relied on the "sole

discretion" of the Pension Committee to make these determinations. See 3rd. op. at pg.11, App.10-11.

At oral argument defendants' counsel also asserted that all VEREP eligible employees were informed that they could not participate in VEREP and at the same time receive severance, citing JA189. 3rd Cir. Op. at 8-9 & Footnote [4] at App.9. See (JA189) at App.86. See TS at App.124-125, line 31 to 23, TS at App.126, line 15-22.

The choice stated in (JA189) is explicitly defined in that document where JA189 speaks, *"If you take VEREP you are not eligible for the separation package as outlined at the meeting of August 20, 1993."* (emphasis added). The separation package (JA171) is one in the same as the release of all claims. See DB at pg.14 reprinted at App.143. See App.86 (JA189) COMPARE with App.85 (JA171). See Affidavit of Robert Muscarella, App.110 par.6-9, and at App.111, par.15. See release of all claims dated September 1, 1993 at (JA173-174).

JA189, does not support counsel's assertions. Counsel did not cite and could not cite from: the plan documents of VEREP, the plan documents of the J&J severance plan, any other document in the record, any statute or any case law that would support these claims. All were before the 3rd Circuit Court of Appeals, (JA001-647).

In apparent reliance upon these asserted claims and May v. Shuttle, Inc., 129 F.3d 165 (DC Cir. 1997),[4] the 3rd Circuit erroneously found that VEREP and the J&J's severance benefits plan

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[4] In May v. Shuttle, Inc., 129 F.3d 165 (DC Cir. 1997), (cited by defendants below), all employees were terminated, the employer implemented an enhanced retirement program for workers over 55 **specifically** because of those terminations, all other employees received a severance. The employees over 55 were not eligible for the enhanced retirement program **prior to or independently of a contingent event unrelated to age**. Id. at 174-175. The instant case differs substantially, VEREP was a voluntary early retirement incentive plan, which prohibits involuntary retirement. Its purpose was to encourage Johnson & Johnson workers over the age of 50 to retire voluntarily during various eligibility periods and had nothing to do with job terminations. See *supra*, at pg.5-6.

were conditioned on terminations of employment and mutually exclusive and therefore, *"As we hold plaintiffs have not met their initial burden to prove adverse treatment we need not address 'safe harbor' arguments."* See op. at 15-17, App.14-15. See TS at App.125-126, ln.34-22. See DB at pg.21-24. This Court may note the 3rd Circuit erroneous finding is made notwithstanding the Panel's probative questions to defendants' counsel and counsel's answers indicating: VEREP was voluntary, available throughout the J&J Family of Companies and not conditioned on terminations of employment .See TS at App.123-124 ln.29-13, TS at 124 ln.31-39.

The 3rd Circuit, while acknowledging the extensive discussion by both parties and *amicus curiae,* the American Association of Retired Persons, of the "safe harbors" statutes of OWBPA, and the existence of "safe harbors" declined to examine the VEREP plan documents, the J&J severance plan documents and most importantly, ADEA 29 U.S.C. §621 *et seq*. See op. at 16-17, App.15.

In so doing the Court ignored the critical analysis that goes to the heart of petitioners' claim, namely that defendants violated ADEA, 29 U.S.C. §621 *et seq*., as a matter of law, by failing to follow the terms of their bona fide voluntary early retirement incentive plan, VEREP, statutorily controlled by OWBPA, which in turn compelled VEREP *eliminated* individuals to retire. See also CFR 1625.10 (d) (7) at App.142.

A grant of *certiorari* will afford the Supreme Court of the United States the opportunity to address and correctly resolve this point.

Question 3

Where individuals in the age-protected class have qualified for severance benefits on the same terms and conditions as other workers, does the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq*., prohibit the reduction or denial of severance to those individuals except as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) or (ii) or §623 (*l*)(2)(A)? If so, were the conditions set

forth in any of these statutes satisfied by the defendants when implementing their VEREP and Severance plan(s)?

COMPARE the statutory language set forth by 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A) with the congressional intent described *infra*.

The issue of whether an employer may deny severance benefits to older workers who receive pension benefits was of central concern to Congress in passing OWBPA. During the deliberations leading up to the enactment of the Act, Congress examined the same employers' policy that is present in the instant case and declared that denying severance to pension-eligible employees violates ADEA. Congress declared that, **"it is per se discrimination to use pension eligibility as a basis for denying an older worker any other benefits,"** H.R. Rep. No. 101-664, at 40.(emphasis added).

The Senate and House of Representatives with jurisdiction over OWBPA **"reaffirm[ed] that pension benefits may not be coordinated with severance payments."** (emphasis added). See S. Rep. No. 101-263, at 23; H.R. Rep. 101-664, at 10. Both Committees noted:

> The prohibition was designed to ensure that older employees who are entitled to certain age-related benefits are not penalized by having those earned benefits used as a basis for reducing or denying non age related benefits, This is particularly important in the area of severance benefits, where the courts of appeals consistently have held that the ADEA prohibits employers from reducing or denying severance pay based on pension eligibility. *See, e.g., EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984); *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984). The Committee specifically agrees with and reaffirms a **fundamental premise** of those holdings: **severance pay and pension benefits are not fungible**. S. Rep. No.101-263 at 22, H.R. Rep. No.101-664, at 38. (emphasis added)

Representative Augustus Hawkins, one of the chief sponsors of OWBPA, reaffirmed Congress' view that pension eligibility is an unlawful proxy for age: "... **pension eligibility** and **early retirement eligibility** continue to be **proxies for age**, and employment decisions based on such factors are unlawful under the ADEA." See EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir.1983), cert. denied, 469 U.S. 820 (1984); EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984) (Remarks of Rep Hawkins), Leg. Hist. at 42, (emphasis added).

See also H.R. Rep. No. 101-664, at 40 ("[T]he bill does not, as a general matter, permit employers to deny or reduce severance based on pension eligibility."). See Leg. Hist. at 42-43, "Nor may an employer reduce or deny an individual's severance benefits based on his **pension eligibility** or pension receipt, except to the **limited extent under these amendments**." (Remarks of Rep. Hawkins) (emphasis added).

VEREP *eliminated* individuals were qualified for severance for at least three independent reasons:

1) Because severance was extended to other individuals eliminated, at least in petitioners' case, *supra*, at pg.7-8.

2) Because the Johnson & Johnson Severance Plan, in language complying with OWBPA's amendments qualified all these individuals for it. See App.49 at 4.1 (b) (ii) where, "*...except that a Participant whose employment is terminated as a result of an event listed in article 4.1(a) and who elects to retire under a retirement plan of the Company **shall be granted** severance pay hereunder;*" (emphasis added).

3) Because defendants themselves identified no less than 42 VEREP *eliminated* individuals, excluding petitioners, who qualified for it under J&J Severance Plan. See *supra*, at pg.7-9.

All VEREP individuals were qualified for VEREP whether their positions were eliminated or not. **It is the fact that the VEREP *eliminated* individuals were eliminated that qualified them for severance.** And the severance they qualified for, as a matter of law,

is necessarily on the same terms and conditions as the *others* and/or the minimum severance provided by terms of J&J's ERISA severance plan, 29U.S.C. §623 (a)(1), (2).

When a claim of unequal severance benefits based on age is made, OWBPA provides the employer with only three affirmative defenses, or "safe harbors":

1) The equal benefit analysis,[4] or that age related costs justify the difference in benefits, [5] 29 U.S.C. §623 (f)(2)(B)(i), **or**

2) The terms of an employee benefit plan or voluntary early retirement incentive plan are followed by the employer and the plan is consistent with the purposes of the chapter, 29 U.S.C. §623 (f)(2)(B)(i), (ii), **or**

3) The denial or reduction of severance satisfies one of OWBPA's explicit exceptions permitted by §623 (*f*)(2)(A).

The first affirmative defense, the equal benefit analysis or that age related costs justify the difference in benefits, can not be satisfied because:

a) It is undisputed that VEREP eliminated individuals received no severance while the *others* did.

b) There can be no age-related cost in providing a severance benefit to an individual where the formula is based on years of service and salary.

The second affirmative defense, that the terms of an employee benefit plan or voluntary early retirement incentive plan are observed by the employer and the plan is consistent with the purposes of the

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[4] "[E]ach discrete benefit (whether provided pursuant to an employee benefit plan or not) is subject to the prohibitions of 4(a)(1)." H.R. Rep. No. 101-664, at 33.

[5] "The only cost to be considered in determining compliance with these amendments is the actual cost of providing the challenged benefit to older workers." H.R.Rep. No. 101-664, at 35.

chapter cannot be satisfied because, as discussed *supra*, at pg.7-9, the VEREP *eliminated* individuals had no option of remaining employed, in violation of 29 U.S.C. §623 (f)(2)(A), (B)(i),(ii).

Also as discussed *supra*, at pg.19, the terms of the J&J severance plan mandated that severance be paid. The plan must have the statutory provisions to comply with OWBPA. Johnson & Johnson and the J&J Pension Committee failed to follow the terms of the severance plan where the severance benefits are applicable to **pension eligible** employees, and where the plan terms are statutorily controlled by OWBPA, not by ERISA. See Controlling Law, Article 8.2 at App.57, see Article 4.1 (b) (ii) at App.49, COMPARE both with U.S.C. §623 (f)(2)(B)(i), (ii), *29 U.S.C. §623(k), 29 U.S.C. §630(l).*

When an employer operates under any of these exceptions, OWBPA places the burden of proof on the employer when challenged in a civil action. See 29 U.S.C. §623(f)(2)(A), (B) (i), (ii) where: *"...An employer, employment agency, or labor organization acting under subparagraph (A) or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter;" or.....*

In the third affirmative defense, that the denial or reduction of severance satisfies one of OWBPA's explicit exceptions permitted by §623 (*l*)(2)(A), where the statutory language speaks with precision and specificity: *"It shall not be a violation of subsection (a), (b), (c) or (e) of this section solely because following a contingent event unrelated to age-"* [6], [7], [8] (emphasis added), §623 (*l*)(2)(A).

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[6] U.S. Representative Henry Clay: "Exceptions [to the OWBPA] were carefully crafted and should be narrowly construed, not used as the basis for creating further exceptions by analogy or otherwise." 136 Cong. Rec. **H8617** (daily ed. Oct. 2, 1990) (statement of Rep. Clay). (emphasis added). See also *Sexton v. Beatrice Foods*, 630 F.2d478, 486 (7th Cir. 1980) quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("Any exemption from... remedial legislation must ... be narrowly construed giving due regard to the plain meaning of the statutory language and the

The word *solely* limits the exception to *a* (one) single event that is unrelated to age. This exception can not possibly apply to any VEREP *eliminated* individual because none were subjected to a single event unrelated to age.

a) Additionally, §623 (*l*)(2)(A), can not be satisfied because; The VEREP is undisputedly an age-related event, specifically retirement by only individuals in the age-protected class.
b) The entire VEREP package of benefits was made available because of an age-related event, specifically retirement by only individuals who had qualified for it independently of any job elimination. [7]

See also discussion of (JA189) App.86, under Question 2, *supra* at pg. 15-16.

Defendants have asserted there is no age-adverse treatment because the value of petitioners' VEREP is greater than the value that *others* received even if severance is combined with pension benefits *others* may have accrued, see DB at pg.18, 39-40, reprinted

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intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announce will of the people." (emphasis added)

[7]The purpose of **U.S.C. 623 (*l*) (2)** "emphasizes that coordination of severance and any age-related benefit is unlawful except as expressly provided in section 4 (*l*) (2)." Sen. Comm. On Labor and Human Resources, 102d Cong., Legislative History of the Older Workers Benefit Protection Act (1991) at 24. (emphasis added).

[8] Cf. Oubre v. Entergy Operations, Inc., 118 S. Ct. 838, 841 (1998) ("the Court is required to take Congress at its word with regard to the precise and detailed statutory strictures on a waiver of ADEA claims established by Title 2 of the ("OWBPA"); Cf. Long v. Sears Roebuck & Co., 105 F.3d at 1539 cert. denied 118 S. Ct. 1033 (1998) ("in enacting the OWBPA, Congress intended to occupy the area of ADEA releases and, in doing so to supplant the common law.").

at App.143, see DB at pg.33-37. In addition defendants have asserted, the J&J Severance Plan gives the Pension Committee the "sole discretion" to deny severance benefits for any reason and to determine that the "Service Benefit" an additional pension benefit included in the VEREP package, was petitioners' equivalent of a severance benefit they would have under the J&J severance plan, see DB at pg.28-31.See 3rd Cir op. at pg.10-11, App.10-11.

The District Court agreed and the 3rd Circuit Court of Appeals affirmed.

A grant of *certiorari* will afford the Supreme Court of the United States the opportunity to address and correctly resolve this point.

Question 4

Should the Court so find in Question 3 *supra*, the answers "yes" and "no" respectively, does an ERISA plan administrator or an employer violate 29 U.S.C. §621 *et seq*., by action contrary to these controlling statutes where the ERISA severance benefit is applicable to age protected individuals? If so, does a Federal Court, in such circumstance, have discretion to deny the certification of an ERISA class when all other conditions for certification are met?

In their complaints at count one, petitioners have asserted that they were entitled to severance pursuant to a qualified ERISA plan as sponsored by Johnson & Johnson and/or pursuant to a qualified plan published by their employer PPC, supra at pg.10.

In their complaints at count two, petitioners have asserted an ERISA class claim for similarly situated persons who at a time when they were scheduled for termination by Johnson & Johnson or one of its wholly owned subsidiaries elected to retire and were not paid a severance pursuant to the Johnson & Johnson Severance Plan, *supra* at pg.10.

Each petitioner protected his or her right for qualified ERISA plan benefits by following the terms of the plan and applied to the Johnson & Johnson Pension Committee for severance benefits. See ARTICLE

7, Claims Procedure (a) at App.55. Johnson & Johnson's Office of General Counsel informed each in exactly the same language:

"The decision has been made not to permit participation by an employee in both the Severance Plan and VEREP. [Therefore your] request for benefits under the Severance Plan have [sic] *been denied."*

See letters for Holder, Hawes, Muscarella, Kadam, App.102-108.

Each petitioner, again following the terms of the plan, appealed from the original denial. See ARTICLE 7, Claims Procedure at (c), App.56. Petitioners' appeals required the Pension Committee to respond, see ARTICLE 7, Claims Procedure at (e), App.56. Defendants acknowledged the receipt of these appeals. However, it is undisputed that no petitioner received a response to their appeal and that all petitioners exhausted the plan's administrative requirements. See petitioners' affidavits and exhibits attached thereto, App.112, ¶¶ 16-18 (JA169-170 at ¶¶ 16-18, Muscarella), (JA160-165 ¶¶ 10-12, Hawes), (JA192-193 ¶¶12-14, Kadam), (JA585-586 ¶¶ 18-20, Holder). See Opinion at App.35-36 (PB2-4-5).

The District Court abused its discretion in denying petitioners' motion for certification of an ERISA class pursuant to Fed. R. Civ. P. 23, on the basis that not all of the proposed class had applied to the plan administrator for severance benefits. The proposed class appeared to be subject to an affirmative defense that they failed to exhaust the plan's internal application process which would defeat typicality and therefore the defendants' asserted defenses may be different. See opinion at App.35-37, (PB2-4-5).

Petitioners submit to this Court, the only defense available to defendants in this case is one of the affirmative defenses provided by OWBPA's "safe harbors". That defense would necessarily apply to the class of VEREP *eliminated* individuals. See 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A). See discussions under Questions 1-3, *supra* at pg.11-22. As shown *supra*, these defenses can not be satisfied and defendants have not asserted any one of them.

Petitioners' ERISA class claim for severance would challenge the lawfulness of Johnson & Johnson and the Johnson & Johnson Pension

Committee's blanket disqualification policy for severance benefits on behalf of all VEREP *eliminated* individuals who were compelled to retire when their positions were eliminated.

The District Court found the proposed class satisfied all other requirements and particularly noted the numerosity requirement is satisfied because no less than **80** persons may fall within the class, some of which are non-residents of New Jersey. See App.35 (PB2-4).

Should this Court so find in Question 3 *supra*, the answer "yes" and "no" respectively, petitioners reiterate that, 29 U.S.C. 621 *et seq*. prohibits any decision to deny or reduce severance, where an age-protected individual is qualified, that is contrary to the exceptions as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A). They further reiterate that neither an employer, nor an ERISA plan administrator, nor a Court of Law may decide an issue contrary to these controlling statutes.

The proposed class members' applications for severance would be futile in the face of defendants' fixed severance benefit policy but also immaterial as a matter of law.

More importantly, the plan administrator's decision would be immaterial with regard to those applications and certification of the proposed ERISA class because it would exceed the administrator's "sole discretion" as a matter of law. The District Court's discretion to deny class certification can not hold, when based on an immaterial factor.

In the circumstances of this case ERISA class certification is mandatory as a matter of law.

Question 5

Does the standard for liquidated damages, established as *stare decisis* by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, (1985) apply in this case as a matter of law?

It is undisputed that VEREP *eliminated* individuals, who were compelled to retire, did not receive severance benefits if they

received VEREP. It is also undisputed that policy was predetermined and maintained by the Johnson & Johnson Companies and the Pension Committee. These facts are evident from the documents of record as set forth below:

1) The only document of record that indicates any VEREP participant was given a choice between a severance package and VEREP is JA189 at App.86. The choice indicated on JA189 is a choice between PPC's severance pay package App.85 (JA171) (same as the release of all claims, see discussion *supra* pg.15-16) and VEREP. See DB at pg.14 at App.143. See discussion *supra*, at pg.7-8, see Hobson's choice at pg. 9.

2) The four letters denying severance in response to petitioners' applications came directly from the Johnson & Johnson Office of General Counsel and stated:

"...(he was)(you were) informed that ... (he)(you) could not participate in both the severance Plan and VEREP. .... (he) (you) chose to participate in VEREP."

The letters further stated that,

"The decision has been made not to permit participation by an employee in both the Severance Plan and VEREP. *[Therefore your] request for benefits under the Severance Plan have* [sic] *been denied."* (emphasis added) See supra, at pg.24, see four letters at App.102-108.

3) In failing to respond to petitioners' severance appeals the Pension Committee again ignored the mandates in the J&J severance plan. See *supra* at pg.23-24. See App.56 Article 7.1, (c), (d), (e).

4) The Affidavit of Joann Heffernan Heisen, a member of J&J's Pension Committee and Corporate Treasurer, at the time of petitioners' applications, App.96-99 (JA377-390) states at ¶ 4:

"Plaintiffs' applications for benefits under the Severance Plan were denied based upon the determination that such benefits

were not available *to persons who elected to receive and were receiving the substantial benefits and benefit enhancements provided under the Voluntary Early Retirement Enhancement Program ("VEREP"). This determination was made by members of the* ***Pension Committee with the advice of Johnson & Johnson's Office of General Counsel*** *acting as counsel to the Pension Committee."* (Emphasis added).

The Affidavit further states at ¶ 6:

"The letters denying Plaintiff's applications were sent on behalf of the Pension Committee pursuant to the delegation of authority to the Office of General Counsel and ***reflected the determination and decisions of members of the Pension Committee.*** *Further, the letters were sent* ***with the knowledge and approval of the Pension Committee****. I personally reviewed and approved the letters denying Ms. Hawes' and Mr. Kadam's benefit applications before they were sent. The contents of the letters denying Plaintiffs applications for benefits [were] also reviewed by* ***Efrem Dlugacz****, another member of the Pension Committee with* ***primary responsibility*** *for VEREP.* (emphasis added).

5) Mr. Efrem Dlugacz the J&J Corporate Director of Benefits at the time, authored the VEREP eligibility letters and sent those letters and the Q & A VEREP information package to all eligible individuals. See App.92-93, See Second Affidavit of Robert Muscarella, App.87-88 ¶¶ 3-5. See VEREP's Q & A's at (JA389-407)

6) See the Second Affidavit of Robert Muscarella, App.89-90 ¶¶ 9-16 and Exhibit I, reprinted herein at App.95, and Exhibit J at (JA510-511) which identify by name the members of the Pension Committee and their respective corporate positions at all times material to petitioners' claims, App.90-91 ¶¶10-16. (JA381-385). Summarily listed *infra*, they are:

Clark H. Johnson, Chairman of the Pension Committee, Chief Financial Officer of Johnson & Johnson, Member of the Board of

Directors and Member of the Executive Committee of Johnson & Johnson.

Efrem B. Dlugacz, Pension Committee Member and Director of Corporate Benefits.

Joanne Heffernan Heisen, Pension Committee Member and Corporate Treasurer of Johnson & Johnson.

Roger S. Fine, Pension Committee Member, Vice President of Administration of Johnson & Johnson and Member of Johnson & Johnson Executive Committee.

Robert E. Campbell, Member the Pension Committee, Vice Chairman, Johnson & Johnson Board of Directors.

Johnson and Johnson's corporate attorneys, Frank Bolden, Vice President Corporate Staff and Donna M. Malin both of the Office of General Counsel, authored letters to each petitioner denying their severance benefits on four separate occasions. See Affidavit of Joann Heffernan Heisen App.97-98 at ¶¶ 5-8. See Supplemental Affidavit of Joann Heffernan Heisen App.100-101 at ¶¶ 1-3. See denial letters at App.104-108.

Johnson and Johnson's severance policy as applied to VEREP *eliminated* individuals was not an ad hoc isolated decision made by one benefit administrator at one subsidiary company, such as JA189 at PPC. It was a corporate wide policy maintained by Johnson & Johnson, the Pension Committee Members and its delegation of their authority to the J&J Office of General Counsel. This policy as confirmed by the defendants, affected no less than **46** VEREP *eliminated* individuals, in no less than **six** of Johnson & Johnson's **30** participating companies. See *discussion supra*, at pg.7-8.

The corporate ranks of the Pension Committee Members are high, the scale of the reckless policy is broad and the "willful" standard as defined in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, is met.

In the circumstances of this case, liquidated damages are mandatory as a matter of law.

SUMMARY OF THE RATIONALE TO REVIEW AND FINAL ARGUMENTS

"The policy of the Older Workers Benefit Protection Act is ..... clear from its title. It is designed to protect the rights and benefits of older workers." Oubre v. Entergy Operations, Inc., 118 S. Ct. 838, 841 (1998) (emphasis supplied).

The "rights and benefits of older workers" are precisely what this case is about. See JA189, App.86 and Hobson's choice at pg.9, *supra*.

Each VEREP *eliminated* individual had a right to severance benefits because their position was eliminated, as a matter of law this right can not be taken away. Each VEREP *eliminated* individual had a right to a VEREP pension benefit, as a matter of law this right can not be taken away. Each right is the result of two solely independent events. As discussed *supra*, to require age protected individuals to chose between these two benefits rights violates ADEA, 29 U.S.C. §621 *et seq.* as a matter of law.

What is central in this case is that petitioners and prospective ERISA class members are all older workers, individuals who are age-protected by the statutory requirements of ADEA, as amended by OWBPA. Both lower Courts failed to recognize the significance of this central point. As discussed *supra*, it is ADEA, 29 U.S.C. §621 *et seq.*, that provides the controlling statutes where benefits are applied to age-protected individuals.

A simple examination of the District and 3rd Circuit Courts' analysis on which their opinions are based reveals the lower Courts' lack of understanding as to the extent and application of the protection afforded by statutes of ADEA, as amended by OWBPA. Both lower Courts began their analysis by first examining the ERISA claim, giving much weight to the administrators' "sole discretion" to determine benefits. As discussed *supra*, any determination contrary to the OWBPA's exceptions is immaterial where the benefit is applied to an age-protected individual.

The District Court, first citing, Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3rd Cir. 1991) [2] as holding that a reservation of authority to deny benefits in a severance plan does not violate ERISA, denied petitioners' ERISA claims, Hawes et al. v. Johnson & Johnson et al., No 94-5332, slip op. at 4-6. (DNJ Dec. 18,1995). App.27-29, (PB1-4 to7).

In determining petitioners' ADEA claims the District Court carried over its ERISA determination; the Court stated:

> To establish a prima facie case, plaintiff is required to prove that he or she was treated adversely based on age. DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 725-27 (3d Cir), cert. denied, 116 S. Ct. 306 (1995). **In the context of discretionary denial of benefits,** the Court should compare the benefits received by younger and older employees. (emphasis added) No 94-5332, slip op. at 7, App.30.

The Court ignored ADEA *29* U.S.C. 621 *et seq.* and relied on the "sole discretion" of the plan administrator to deny severance. The Court then concluded: **"Hence, plaintiffs have failed to state a valid claim of age discrimination."** No. 94-5332, slip op. at 8, App.30.

The 3rd Circuit Court in first determining petitioners' ERISA claims stated:

> If an ERISA plan grants the plan administrator (here the J&J Pension Committee) discretion in interpreting the plan's terms, a Court must review the administrators decision to either grant or deny benefits under the 'arbitrary and capricious' standard. See, e.g., Dewitt v. Penn-Del Directory 106 F.3d 514, 520 (3d Cir. 1997) [2]. There is little doubt that the J&J severance plan grants the J&J Pension Committee the requisite discretion so as to warrant this differential standard of review." Hawes et al. v. Johnson & Johnson et al., No. 98-6408, op. at 10 (3rd Cir. Oct. 20,1999). App.10.

In the 3rd Circuit analysis of petitioners' ADEA claim the Court stated:

> The named plaintiff argue that J&J treated older workers adversely by forcing them to choose between normal severance and retirement benefits and the enhanced retirement package known as VEREP, a choice not given to younger J&J workers. However, it appears that the named plaintiffs, and other workers over the age of fifty, were treated *more* favorably than their younger counterparts insofar as they were given a choice between two different options, one that provided benefits identical to those available to younger employees and another that provided *greater* benefits than were given to younger employees. Viewed from this perspective, the named plaintiffs cannot meet their burden to prove that J&J treated older workers less favorably than younger counterparts." *(emphasis in original),* (emphasis added), No 98-6408, op. at 13, App.12.

By first examining ERISA and not ADEA, both Courts demonstrated a lack of understanding as to how ADEA, as amended by OWBPA and ERISA employee benefit plans are wholly intertwined when applied to an age-protected individual.

This lack of understanding was fatal to any proper consideration and analysis of petitioners' claims.

When an age-related benefit claim is made under both ERISA and ADEA statutes, the age-related claim must be examined first, because as shown *supra,* any other method of proceeding to determination of such claims would be immaterial.

The 9th Circuit recognized this in Kalvinskas v. California Institute of Tech., 96 F.3d *supra,* at 1307, fn2:

> The District Court held that Kalvinskas' FEHA claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. SS 1001 et seq. Because we

---

[2]The 3rd Circuit decisions in Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3rd Cir. 1991) and Dewitt v. Penn-Del Directory 106 F.3d 514, 520 (3d Cir. 1997), did not consider the evidential import of any age-related claim.

hold that Kalvinskas is entitled to summary judgement on his ADEA claim, we need not reach the preemption question.

In the instant case, the 3rd Circuit also misunderstood the term "safe harbors" as evidenced by this language in the Court's opinion:

> Both parties, as well as *amicus curiae*, spend considerable amount of space in their briefs discussing the "safe harbors" from ADEA liability that Congress promulgated as part of OWBPA. See. e.g., 29 U.S.C. 623(f)(2)(B)(i) (articulating the "equal benefit, equal cost" defense). In essence, these provisions of the ADEA are affirmative defenses – they allow an employer to escape liability even if it[s] challenged benefit scheme treats older workers adversely to younger counterparts. As we hold that the named plaintiffs have not met their initial burden to prove adverse treatment, we need not address "safe harbors" arguments. (emphasis added) No. 98-6408, op. at 16, App.15.

What the Court has failed to realize here is, all employee benefits plans must comply with OWBPA and in so doing an employer's plan becomes the "safe harbor" for affirmative defenses. The "safe harbor" affirmative defense requires the employer, *"..to observe the terms of a bona fide employee plan..."*, 29 U.S.C. 623(f)(2)(B). If an employer fails to observe the terms of such plan when applied to an age-protected individual, the employer treats that individual adversely because of age. That is age discrimination.

Johnson & Johnson created (2) bona fide employee benefit plans. The J&J Severance Plan and the VEREP, two affirmative defenses, two "safe harbors". Each one had the necessary language to satisfy the statutory requirements of ADEA, as amended by OWBPA, specifically 29 U.S.C. 623(f)(2)(B)(i) and (ii) and in each of these affirmative defenses the statute places the burden of proof on the employer, see *supra*, pg.21. See statutes at App.132-133.

Defendants have never asserted or proved either affirmative defense. Nor can they.

COMPARE: the normality of asserting an affirmative defense, a "safe harbor", in "A", with the anomaly in "B":

A) When challenged by a VEREP individual, who retired voluntarily, with age-adverse treatment, the employer can simply assert the affirmative defense " ...[in] observe[ance] [of] the terms of a bona fide employee plan-", 29 U.S.C. 623(f)(2)(B), the individual retired voluntarily.

B) When challenged by a VEREP *eliminated* individual, who retired involuntarily, with age-adverse treatment, the employer can not assert the affirmative defense as in "A" but instead asserts **"...they were treated better, not worse,.."**, see DB at 18 & DB at 39-40, reprinted at App.143-144, see TS at App.119-121, ln.39-4, see TS at App.129 ln.21-36. The lower Courts then hold there is no age-adverse treatment, there is no *prima facie* case because petitioners have not met their initial burden. See 3rd Cir. op. at pg.17, App.15. See District Court op. at 8, App.30.

As discussed *supra*, defendants violated ADEA, 29 U.S.C. §621 *et seq*., as a matter of law for four independent reasons:

1) Because VEREP *eliminated* individuals did not have the same option as the other VEREP individuals because none had the option of remaining employed. *Supra*, pg.7. That is age discrimination.

2) Because VEREP *eliminated* individuals were compelled to retire, in violation of 29 U.S.C. 623 (f)(2)(B) (i), (ii). That is age discrimination.

3) Because 29 U.S.C. 623 (f)(2)(B)(i) **or** (ii) **or** 623 (*l*) (2)(A) can not be satisfied. That is age discrimination.

4) Because defendants failed to observe the terms of their Severance Plan and their VEREP when applying those benefit plans to VEREP *eliminated* individuals. That is age discrimination.

The 3rd Circuit Panel could have reached the conclusions that petitioners suggest here had the Panel not relied on defendants' bald assertions and not stopped its analysis short where it did. See also petitioners' petition, amended petition and supplement to amended petition for rehearing *en banc*, which cite with particularity the material facts and issues of law the Panel misapprehended. See Orders denying petitions at App.19-20. See also Transcript TS App.115-116 ln.18-4, App.119 ln.11-22, App.119-121 ln.39-4, App.121 ln.15-39, App.129 ln.7-36.

In passing OWBPA Congress identified pension eligibility as a proxy for age. See pages 18-19, *supra*. See also, the final reports of both the Senate and House of Representatives committees responsible for the passage of the Act who emphasized that "..pension benefits are age-related. Pension eligibility is proxy for age." S. Rep. No. 101-263 at 23; H.R. Rep. No. 101-664, at 40. (emphasis added)

In Hazen Paper Co. et al., v. Biggins, 507 U.S. 604 (1993), a decision[10/] involving an employment termination before the enactment of OWBPA this Court stated:

> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. *Id.*, at 612. (emphasis added)
>
> Nor do we rule out the possibility of dual liability under ERISA and ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service,... .....That

---

[10/]Interestingly this Court decided this case on April 20, 1993, well after the passage of OWBPA, the decision in Hazen turned on years of service rather than age. Biggins was fired in 1986. OWBPA was enacted prospectively on Oct.16,1990 as to employee benefit plans, and as to other conduct occurring after April 14, 1991. OWBPA could be of no use to Biggins even if age or pension status were factors.

case is not presented here. *Id.*, at 613. (emphasis added)

"That case is not presented here." The day to examine the "special case" and the issues identified in Hazen Paper has arrived.

The question left open in Hazen Paper is whether a "disparate impact" claim is cognizable under ADEA. In the instant case such a claim is viable, as established, *supra*:

When positions were eliminated, the employer and/or the J&J Pension Committee with reserved "sole discretion" could decide which individuals were to receive severance and which individuals would not. That is the stated facially neutral policy in this case.[11/]

1) *Others*, who were not eligible for VEREP received severance.

2) VEREP *eliminated* individuals did not receive severance.

3) The employer and/or Pension Committee's corporate severance policy and corporate policy statements: *"...not to permit participation in..."* and *"...benefits were not available to.."* or the "Hobson's choice" provided to petitioner(s) in JA189, only impacted age protected individuals with pension eligibility status namely the class of VEREP *eliminated* individuals.

When expressed in these simple terms, age discrimination as a result of disparate impact becomes apparent. The legislative history of OWBPA speaks to this also and closes the gap on the disparate impact theory left open by this Court in Hazen Paper, as established *supra*. OWBPA says:

1) Pension eligibility is a proxy for age.

2) Denial of a benefit based on a pension eligibility status is tantamount to denial of a benefit based on age.

[11/]Based on the "sole discretion" reserved by J&J's ERISA severance plan defendants could decide to reduce, deny or require a choice between severance benefits and VEREP but actually contrary to the mandate in that plan that severance benefits be paid to individuals who retired when their positions were eliminated.

Petitioners submit to this Court, the intent of Congress, *inter alia*, in enacting OWBPA was to make clear, as a matter of law, that pension eligibility is the statutory equivalent of age.

This disparate impact analysis is presented to this Court as an authoritative argument to the finding that the instant case merits review.

CONCLUSION

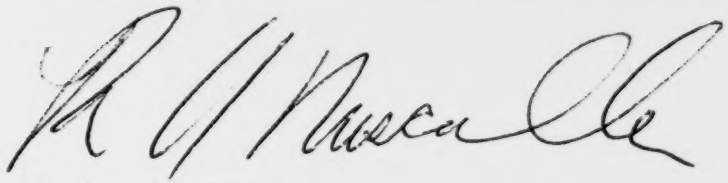
It is apparent the lower Courts in this case misunderstood the extent to which OWBPA's objective standards protect the benefit rights of age-protected individuals. See e.g., 29 U.S.C. 623 (f)(2)(B) ("equal benefit, equal cost"). In the instant case the standards used by both lower Courts for the determination of age-adverse treatment and a *prima facie* case ignored the mandates of OWBPA.

Congress enacted the OWBPA amendments on Oct.16, 1990, nearly ten years ago in response to this Court's decision in Ohio Pub. Employees Retirement System v. Betts, 492 U.S. 158 (1989). The lower Courts' decisions in this case effectively nullified those statutory amendments.

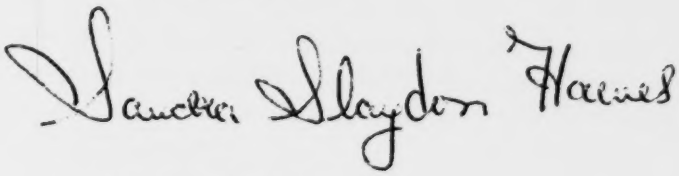
Petitioners seek the Court's guiding authority and supervisory powers first, to provide the necessary standards in OWBPA case law that will guide the Federal Courts in determining age discrimination in employee benefits, and second to correct the wide spectrum of legal error and injustice existing below.

Petitioners pray that this Court exercise its judicial discretion in favor of granting *certiorari* to review the instant case.

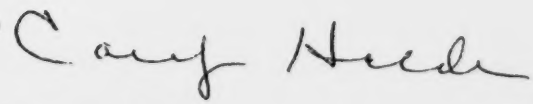
Respectfully submitted by each named petitioner *pro se* ,



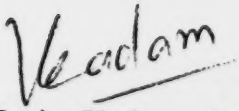
Robert A. Muscarella



Sandra Slaydon Hawes



Carolyn Holder



Vanita Kadam, the estate of Manohar B. Kadam

Dated: MAY 15 2008

INDEX FOR APPENDIX VOL. I

Opinion and Order of the United States Court of Appeals for the Third Circuit filed on October 20, 1999 ---------- 1-18

Orders denying Petitions for rehearing and rehearing *en banc* dated December 30,1999 ---------- 19-20

Opinion and orders of the District Court of New Jersey - 24-43
Hawes, *et al* ---------- 24-31
Class Certification ---------- 32-38
Holder ---------- 39-43

INDEX FOR APPENDIX VOL. II

Severance Plan and Summary Plan Description of Johnson and Johnson and Affiliated Companies, --------- 44-58
(attached to the Affidavit of Joann Heffernan Heisen, as Exhibit A)

Retirement Plan of Johnson and Johnson and Affiliated Companies, COVER and TABLE OF CONTENTS ----- 59-62

ARTICLE 12, EARLY RETIREMENT INCENTIVES, the Retirement Plan of Johnson and Johnson and Affiliated Companies, pages 73-75. ---------- 63-65

EXHIBIT E, EARLY RETIREMENT INCENTIVE PROGRAMS, of the Retirement Plan of Johnson and Johnson and Affiliated Companies ---------- 66-73

The Order of Magistrate Judge Ronald Hedges of March 20, 1995 ---------- 74-77

Defendants' Response to the Order of Magistrate Judge Ronald Hedges of March 20, 1995 ---------- 78-84

SEVERANCE GUIDELINES PPC ENGINEERING (MILLTOWN PLANT CLOSURE) **(JA171)** ---------- 85

JA189, Memo to Robert Muscarella from R. J. Rapiejko, indicating choice between separation package and VEREP ---------- 86

Second Affidavit of Robert Muscarella---------- 87-91
Exhibit **F**, attached thereto ---------- 92-93
Exhibit **H**, attached thereto ---------- 94
Exhibit **I**, attached thereto---------- 95
(Signature page, CERTIFICATION OF PENSION PLAN AMENDEMENT AND RESTATEMENT)

INDEX FOR APPENDIX VOL. III

Affidavit of Joann Heffernan Heisen---------- 96-99
(Note: Exhibit A, J&J Severance Plan, attached thereto at App.48-58)

Supplemental Affidavit of Joann Heffernan Heisen ------ 100-101
Exhibit A as attached thereto ---------- 102-103
(Denial of severance to Holder)

Denial of severance to; Hawes, Muscarella, Kadam ------ 104-108

Affidavit of Robert Muscarella ---------- 109-112

TRANSCRIP [1] (partial) of audio tape from proceeding (Oral Argument) before the 3rd Circuit Panel on September 22, 1999 ---------- 113-129

Statutes Involved, set out verbatim ---------- 130-142
28USC §1254 (1) ---------- 130
29USC §621 (a) ---------- 130-131
29USC §623 (a) (1), (2), (3) ---------- 131-132
29USC §623 (f) (2) (A) ---------- 132

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[1] May it please the Court, by information provided by the Clerk of Court, Petitioners are informed, the RULES of the Supreme Court of the United States, adopted January 11, 1999, effective May 3, 1999, do not prohibit inclusion of a TRANSCRIP which has not been certified.

INDEX FOR APPENDIX VOL. III

Statutes Involved, set out verbatim, continued.

29USC §623 (f)(2)(B) (i), (ii) ---------- 132-133
29USC §623 (f) (3) ---------- 133
29USC §623 (i) (8), (9) ---------- 133
29USC §623 (k) ---------- 134
29USC §623 (*l*) (i), (ii), (iii) ---------- 134
29USC §626 (c) (1) (2)---------- 135-136
29USC §630 (a), (b), (f), (*l*) ---------- 135-136
29USC §631 (a) ---------- 136
29USC §1001 ---------- 137
29USC §1002 (1), (3) ---------- 137

Code of Federal Regulations1625.10 (a),(b),(c),(d),(f) --- 138-142

Citations from Defendants' Reply Brief on Appeal
From Page 14 ---------- 143
From Page 18 ---------- 143
From Pages 39-40 ---------- 143-144